IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.457 OF 2006
IN
SUIT NO.1457 OF 2001

Deepak Builders Pvt.Ltd. Plaintiff

versus

Ebasco Finance Pvt.Ltd. & ors. Defendants

and

The Court Receiver, High Court, Bombay. Respondent

Mr.S.A.Diwan with Mr.Birendra Saraf and Ranjit Dharmadhikari i/by Krishna Tanna for plaintiff.

Mr.P.K.Samdani i/by Bilawala & Co. for defendants

CORAM : S.C.DHARMADHIKARI, J.

DATE : 2nd May 2006

PC :

1. Heard Shri Samdani - learned Senior Counsel for defendants 1 and 3 and Shri Diwan - learned Senior Counsel for the plaintiff.

2. This is an application by the defendants 1 and 3 to quash and set aside the order dated 21st March 2006 passed by the Court Receiver.

3. Shri Samdani - learned Senior Counsel appearing for defendants 1 and 3, at the outset, submits that defendants 1 and 3 are agreeable to remove the flower beds which have been put on the subject portion. The fencing has already been removed. Now, the issue remains, as to whether a gate put up, which was already existing, should be removed or not. In his submission, the gate was always there at the portion which has been shown as Part-A between A and B on the plan annexed to the Consent Terms. In his submission, neither the obligations under the agreement nor the consent decree, in any manner, stipulate that the gate could not be erected. In any event, by putting up a gate, 8 meters wide right of way guaranteed to the plaintiff, is not in any way adversely affected. The gate is to safeguard the property which belongs to defendants 1 and 3 and more so when it is utilised as a service apartment/ residential hotel. He invites my attention to the consent decree and submits that the direction of the Court Receiver to remove the gate, is, therefore, contrary to the consent terms as also to the agreements which have been the subject matter of suit and the consent terms.

4. On the other hand, Shri Diwan - learned Senior Counsel appearing for plaintiff-decree holder submits that the consent decree must be read as a whole and in the light of the orders, directions and undertakings recorded therein, it is apparent that putting up of a gate, is nothing but denial of right of way to the plaintiff-decree holder, when the plaintiff- decree holder is developing a Plot bearing No.Z-3 admeasuring 2,900 sq.mtrs. having potential of 65,000 sq.ft. of FSI.. It is not as if only during the course of the construction that the right of way is necessary. The same must be available upon the property being fully developed as well. Thus, putting up a gate would mean that the construction activities at the site would be hampered and, therefore, the direction to remove the gate, was called for and it was done pursuant to the appointment of Architect/Expert who carried out an inspection and submitted a report. Therefore, the order does not require any interference.

5. Consent decree is passed in a suit which was filed by the plaintiff against the defendants essentially to assert their right of way. After prolonged negotiations and agreements it is only

the right of way which remains subject matter of the controversy between the parties. That was resolved by the consent terms and based upon which the consent decree came to be passed. The consent decree provides that the plaintiff, their agents, servants, directors, assignees and all persons claiming through them, are entitled to a right of way having eight meter's width and passing through a property being Plot No.Z-2 admeasuring 1,425.4 Sq.mtrs. and which is delineated in Brown Colour and marked with letters A and B and C to D on the plan which is marked Exhibit-A to the plaint and plan no.2 to the Supplemental Agreement dated 19th December 2000. As to what was to happen if the same was obstructed in any manner or encroached upon, is also taken care by the parties by consent. In other words, the Court Receiver, High Court, Bombay, was to step in upon failure of defendant no.1 to remove all structures, sheds, septic tank, wall, dust bin, watchman's cabin etc. (whether permanent, temporary or otherwise) which was constructed and/or erected on the right of way having 8 mtrs. width passing through the suit property. The right of way was to remain open to the sky unbuild.

6. It is in these circumstances that the Court Receiver has stepped in with all powers and specifically the power to remove and clear all obstructions and construction in the right of way and to do all acts, deeds, matters necessary to ensure the right and enjoyment by the plaintiff.

7. That the Court Receiver has stepped in, is not disputed. That he stepped in because of the fencing placing of flower pots and erection of gate, is also not disputed. That he convened meetings and tried to resolve the matter at his end, is also not disputed. However, when the matter could not be worked out, he entrusted the inspection to Architects Parelkar and Dallas, who have submitted their inspection report, based upon which the directions came to be issued by the Court Receiver.

8. Having perused these materials and the agreements in question, clauses of consent terms, in my view, the same contemplate a clear, unobstructed and unbuild right of way from the portion which has to be kept open to sky. The fact that the fencing and flower pots are put up and a gate affixed thereto, would definitely mean that the same is not unobstructed or uninterfered

with. It is not as if the Court Receiver was to step in only for the purposes of taking charge of that portion, but he was conferred with all powers and it was not disputed before me that it was well within his powers to call for the report and issue directions, as are issued and impugned before me. Once the obligations are clear, the terms are clear and undertakings are also clear, then it is not open for defendants 1 to 3 to urge that by putting up a gate they are not obstructing or interfering with the right of way. The submission with regard to protecting and safeguarding defendant nos.1 to 3's property same need not be entertained in these proceedings. It is not going to be difficult for them to take steps in that behalf. By keeping eight meters portion open, it is not as if they are not in a position to safeguard and protect their property. That is not even the apprehension muchless it being substantiated in these proceedings.

9. In the light of above, there is no substance in the Chamber Summons and it is accordingly dismissed. The Court Receiver not to insist upon removal of the gate by defendants 1 and 3 for a period of eight weeks from today.

(S.C.DHARMADHIKARI, J.)